



Scottish Information  
Commissioner  
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# Decision Notice 024/2025

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## Whether request was manifestly unreasonable

Authority: Scottish Water

Case Ref: 202300646

### Summary

The Applicant asked the Authority for copies, or details of all correspondence the Authority had had with Savills regarding the Bothwell sewer replacement. The Authority initially provided some information but refused to carry out a review of its original decision because it considered the request to be manifestly unreasonable. The Commissioner investigated and required the Authority to issue a revised review outcome.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and paragraphs (a), (b), (c) and (f) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available); 16(3) and (4) (Review by Scottish public authority); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

## Background

1. On 17 February 2023, the Applicant made five separate requests to the Authority. For each year from 2019 to 2023, the Applicant asked for copies, or details of all correspondence between the Authority and Savills in relation to the Bothwell sewer replacement, with reference to a specific location. The Applicant asked that the response to each of his requests should include all correspondence of whatever nature, and include details of any meetings, minutes of meetings and telephone calls.
2. The Authority responded on 17 March 2023, notifying the Applicant that the requests were requests for environmental information and that, consequently, it had dealt with them under the EIRs. The Authority amalgamated the five separate requests into one single request, and it disclosed some information but withheld other information under regulation 11(1) and (2) of the EIRs, because it was either the personal data of the Applicant or of third parties.
3. On 24 March 2023, the Applicant wrote to the Authority requesting a review because they had concerns that some of the redactions made by the Authority were unnecessary and excessive, which meant that they had difficulty understanding the information that had been disclosed. The Applicant argued that when sender/recipient information was being redacted from emails, some indication of the organisation involved should be provided.
4. The Authority failed to respond to this requirement for review and the Applicant appealed to the Commissioner who subsequently contacted the Authority and advised it to carry out a review and notify the Applicant of the outcome of that review as soon as possible.
5. The Authority notified the Applicant of the outcome of its review on 16 May 2023. The Authority modified its position and applied regulation 10(4)(b) of the EIRs to the Applicant's requests on the basis that the language used by the Applicant in correspondence following its original response of 17 March 2023, was unacceptable.
6. On 25 May 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated that they were dissatisfied with the outcome of the Authority's review because their requests had not been responded to within the relevant timescales and the Authority had failed to properly deal with their requirement for review. The Applicant also noted that they had withdrawn the offensive comments, and the Authority had accepted this.

## Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 1 June 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
9. The case was subsequently allocated to an investigating officer.

## **Commissioner's analysis and findings**

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

### ***Application of the EIRs***

11. The Authority considered that the Applicant's request was for environmental information, as defined in regulation 2(1) of the EIRs and, therefore, should be dealt with under the EIRs.
12. Where information falls within the scope of regulation 2(1), a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
13. The Applicant has not challenged the Authority's decision to handle their request under the EIRs and the Commissioner is satisfied, in the circumstances, that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (b), (c) and (f) of that definition.

### ***Section 39(2) of FOISA – Environmental information***

14. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
15. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
16. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs.

### ***Handling of the request***

17. It is a matter of fact that the Authority did not notify the Applicant of the outcome of its review within 20 working days, as required by regulation 16(4) of the EIRs.
18. The Commissioner must therefore find that the Authority failed to comply with the requirements of regulation 16 of the EIRs.
19. As the Authority did subsequently notify the Applicant of the outcome of its review (on 16 May 2023) the Commissioner does not require the Authority to take any steps to remedy this particular failure. However, the Commissioner has recorded these procedural failures in his case management database, which is used to inform and monitor FOI practice by authorities.

### ***Regulation 5(1) of the EIRs***

20. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so.
21. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

### ***Regulation 10(4)(b) – Manifestly unreasonable***

22. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.
23. The following factors are relevant when considering whether a request is manifestly unreasonable, that is, that the request:
  - (i) would impose a significant burden on the public authority;
  - (ii) does not have a serious purpose or value;
  - (iii) is designed to cause disruption or annoyance to the public authority;
  - (iv) has the effect of harassing the public authority;
  - (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

This is not an exhaustive list. Depending on the circumstance, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

24. In its review outcome, the Authority explained that it had refused the request under regulation 10(4)(b) of the EIRs because it considered that the Applicant's conduct was unacceptable.
25. When providing the Commissioner with a copy of the outcome of its review, on 19 May 2023, the Authority conceded that, despite the application of its Unacceptable Actions Policy, it did have a duty under the EIRs to respond to the Applicant's requirement for review.

### ***The Commissioner's view on the exception***

26. The Commissioner has carefully considered the evidence presented to him by the Applicant and the Authority.
27. The Commissioner notes that, despite a number of opportunities to do so, the Authority did not provide the Commissioner with any detailed comments to support its application of regulation 10(4)(b). The Authority provided the Commissioner with only a timeline of correspondence between itself and the Applicant, along with copies of that correspondence, it did not provide any arguments in support of its view.

28. The Commissioner recognises that the Authority invoked its unacceptable actions policy in response to comments made by the Applicant. However, the Commissioner also notes that those comments (subsequently withdrawn by the Applicant) were made by the Applicant in relation to other matters, quite separate from this information request.
29. Having considered the evidence before him and, in the absence of any detailed submissions from the Authority, it appears to the Commissioner that the Authority has, in effect, taken a view that the Applicant is manifestly unreasonable rather than the requests made by them. The Commissioner cannot support this position.
30. Without any detailed comments from the Authority to explain why it considers the Applicant's request to be manifestly unreasonable, and which of the factors discussed in paragraph 23 are relevant, the Commissioner has no understanding of the Authority's position.
31. In all the circumstances of the case, the Commissioner is not satisfied that the Authority was entitled to apply regulation 10(4)(b) of the EIRs to the Applicant's requests.
32. As the Commissioner is not satisfied that the Authority was entitled to rely on the exception in regulation 10(4)(b) of the EIRs, he is not required to go on to consider the application of the public interest test in regulation 10(1)(b) of the EIRs.

## Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

He finds that the Authority

- failed to carry out a review as required by regulation 16(3) of the EIRs
- failed to carry out a review within the time required by regulation 16(4) of the EIRs,
- was not entitled to rely on the exception in regulation 10(4)(b) of the EIRs for information which would fulfil the Applicant's request and therefore failed to comply with regulation 5(1) of the EIRs in refusing to respond to the request.

The Commissioner therefore requires the Authority to respond to the Applicant's requirement for review in accordance with the requirements of the EIRs (otherwise than in terms of regulation 10(4)(b)), by **16 March 2025**.

## Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## **Enforcement**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

**Euan McCulloch**  
**Head of Enforcement**

**30 January 2025**